LAW OFFICES

ROSS & HARDIES

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

888 SIXTEENTH STREET, N.W.

WASHINGTON, D.C. 20006-4103

202-296-8600

TELECOPIER
202-296-8791

150 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS 60601-7567
312-558-1000

PARK AVENUE TOWER
65 EAST 55TH STREET
NEW YORK, NEW YORK 10022-3219
212-421-5555

580 HOWARD AVENUE
SOMERSET, NEW JERSEY 08875-6739
908-563-2700

STEPHEN R. ROSS

January 19, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Broadcast Signal Carriage Issues
MM Docket No. 92-259

Dear Ms. Searcy:

Enclosed on behalf of InterMedia Partners are the original and nine copies of the "Reply Comments of InterMedia Partners" in the above-referenced proceeding.

Please address any questions concerning this matter to the undersigned.

Sincerely yours,

Stephen R. Ross

Enclosures

No. of Copies rec'd 0+9
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-259
and Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

REPLY COMMENTS OF INTERMEDIA PARTNERS

Stephen R. Ross
Paula E. Brodeur

ROSS & HARDIES
888 16th Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 296-8600

Counsel for InterMedia Partners

January 19, 1993

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SUMMARY OF ARGUMENT

Although InterMedia Partners ("InterMedia") believes that the must-carry and retransmission consent provisions of the Act are unconstitutional, it has submitted comments in this proceeding which it believes will assist the Commission in promulgating regulations for the successful implementation of the Act. In this regard, InterMedia notes that its comments are generally reflective of the submissions of most cable operators and broadcasters. InterMedia has proposed that cable operators should be permitted to designate the "principal headend" for must-carry purposes, and that the cable system should be considered to be located in the ADI in which the principal headend is located. Both broadcast stations and cable operators should be permitted to file requests to modify an ADI, and the top-100 market list should be updated only once every three years to coincide with the three-year election between must-carry and retransmission consent. InterMedia also proposes that substantially duplicative programming and the definition of "network" should both be based on whether a station offers 14 hours of nonsimultaneous duplicative prime time programming per week. The Commission must make an affirmative determination that a low power television qualifies for must-carry status before a cable operator is obligated to carry that station. The burden of delivering a good quality signal rests with the broadcast station, and the cable operator should be permitted to delete signal enhancements, such as ghost-cancelling, from both

commercial and noncommercial signals. In addition, InterMedia submits that the Commission should impose a 30-day time limit within which complaints may be filed with regard to channel repositioning or deletion. Broadcast stations should have the right to grant unfettered consent to the retransmission of their signals, including the right to exhibit all of the programming contained in the signal. InterMedia also submits that multichannel video programming distributors include DBS, MMDS, MATV, and SMATV operators for purposes of the Act. Must-carry and retransmission consent election deadlines must occur on the same date, and cable operators should be given at least 90 days from the election to implement. Those broadcast stations that elect retransmission consent must negotiate issues such as channel positioning, carriage of full program schedule, "syndex", and network nonduplication protection. Finally, radio stations are not subject to the retransmission consent provisions of the Act.

Most importantly, InterMedia emphasizes that the Commission should ensure that cable operators have the flexibility necessary to effectively implement the Act's requirements. This operator flexibility is particularly important with regard to the issues of designation of the principal headend, channel positioning, contractual negotiations, and implementation schedules. The Commission's sensitivity to these issues is necessary for the successful implementation of the Act.

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REPLY COMMENTS OF INTERMEDIA PARTNERS

I. Introduction

InterMedia Partners ("InterMedia"), by its attorneys, hereby submits these reply comments to comments submitted in response to the Federal Communications Commission's ("FCC"'s or "Commission"'s) Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

As noted in the comments submitted on behalf of InterMedia on January 4, 1993, InterMedia owns and operates cable television systems throughout the United States. InterMedia is thus subject to the mandatory carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"), as well as any implementing regulations promulgated by the FCC.

InterMedia once again submits that the must-carry and retransmission consent provisions of the Act are unconstitutional, however, it recognizes that the FCC is charged with proceeding with this rulemaking absent judicial intervention. Accordingly, InterMedia takes this opportunity to

respond to various issues addressed by the comments submitted by other parties in response to the NPRM.

II. Must-Carry Regulations

A. Location of Principal Headend

The Commission has proposed to permit a cable operator with multiple headend facilities to designate the "principal" headend for purposes of determining when a qualified noncommercial educational ("NCE") station is "local" for purposes of the must-carry rules. A majority of the commenters, including InterMedia, agree with the Commission's proposal. This proposal is consistent with the Commission's recognition in the must-carry rules it adopted in 1986 that the cable operator is the entity most appropriate to designate the principal headend. See Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Stations, 1 FCC Rcd. 864, 887 (1986). To the best of InterMedia's knowledge, there have been few, if any, complaints that a cable operator has ever designated a particular headend as its "principal" headend in order to avoid any of its signal carriage obligations. InterMedia thus submits that cable operators should also be permitted to designate the principal headend for must-carry purposes and should be given flexibility to unilaterally change that designation to accommodate technological changes, rebuilds, and relocations. Any party opposing the designation should have the burden of demonstrating

that a cable operator's designation was made in order to circumvent its must-carry obligations

B. Location of the Cable System

With regard to the determination of the location of a cable system for application of the must-carry provisions where a cable system is located in more than one Area of Dominant Influence ("ADI"), InterMedia has proposed that the cable system should be designated as being in only one ADI and that such designation should be based on the location of the principal headend. The cable operator should be permitted to designate the principal headend for purposes of determining which ADI it operates in. Certain broadcasters proposed in their comments that if a cable system straddles two ADI's, the cable operator should be required to consider the must-carry requests of stations located in both ADI's. InterMedia, and the vast majority of commenters strongly disagree. As discussed in InterMedia's previously submitted comments and as noted by the Commission itself in the NPRM at ¶ 17, such a requirement may subject a single technically integrated cable system to potentially inconsistent carriage obligations. See Comments of InterMedia Partners at 10. It was not the intent of Congress to place demands on a cable system for the carriage of signals in excess of the capacity required by the Act. Congress' intent that cable operators be subject to must-carry requests from stations in only one market is evident from the language Congress used in defining the term "local television station" wherein

Congress used the term "market" in the singular in limiting the pool of stations eligible for must-carry status to stations operating in a community of license which "is within the same television market as the cable system." See Section 614(h)(1)(A).

C. Modification of ADI's

InterMedia has proposed that either a broadcast station or a cable operator should be permitted to file a request to add or subtract communities from a broadcast station's television market. Most commenters, including a majority of broadcasters which addressed this issue in their comments, agreed that cable operators as well as broadcasters should be permitted to file such a request. Only two commenters went so far as to suggest that only broadcast stations should be permitted to file such requests.

Clearly, the most reasonable approach would be for the Commission to accept requests from both cable operators and broadcast stations. This approach would also best reflect the intent of Congress. Congress' intent to permit cable operators to make market modification requests is evidenced by the fact that Congress provided for the addition or subtraction of communities from a market. Certainly, Congress anticipated requests from cable operators, as it would be extremely unlikely that a

broadcaster would request that a community be subtracted from a market.[1]

Two commenters suggested that the definition of a local television market should be updated yearly in accordance with changes by Arbitron in the ADI definition. Such a requirement would be completely chaotic, resulting in changes to a cable operator's signal carriage complement on a yearly basis. This would prove to be extraordinarily disruptive to the public, cable operators, and broadcasters and would result in needless additional costs. A number of commenters proposed that the market list be frozen for Commission purposes as of the date the rules are adopted. InterMedia and several other commenters have proposed that the list be updated every three years to coincide with the three-year election between must-carry and retransmission consent. Adoption of this proposal would most fairly balance the necessity that changes in the market be reflected with the need for stability on the part of subscribers, cable operators, and broadcasters.

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[1] Capital Cities/ABC has suggested that only broadcast stations be allowed to file requests to modify their own market definitions in order to avoid the "considerable potential for a proliferation of nonmeritorious 'negative' requests." See Comments of Capital Cities/ABC, Inc. at 6. InterMedia notes that there is no reason to believe that either cable operators or competing broadcast stations would seek to file frivolous requests. To the extent that the Commission determines that a request is nonmeritorious, the Commission in empowered to deny any such request summarily.

D. Substantial Duplication and Definition of Network

InterMedia has proposed that a broadcast station should be deemed to "substantially duplicate" the programming of another station if it offers 14 hours of duplicative prime time programming per week. This 14-hour benchmark should also apply to the definition of a "network." Most commenters that addressed either or both of these issues agreed that the Commission should adopt the "14 hours of duplicative prime time programming per week" standard. The adoption of such a standard would best serve the Act's purpose to preserve both the cable operator's discretion and diversity of program choices for the viewing public. See Comments of InterMedia Partners at 5, 17. It is also consistent with the definition the Commission adopted in 1986 under its then-revised must-carry rules in the context of affiliates. See NPRM at fn. 33. Finally, InterMedia submits that the programming need not be broadcast simultaneously by the two stations in order to constitute substantially duplicative programming. As Capital Cities/ABC states in its comments, the use of prime time in the criterion would ensure that identical programs would likely be broadcast sufficiently close in time to be considered "duplicative" for purposes of the Act. See Comments of Capital Cities/ABC, Inc. at 17-18.

E. Low Power Television("LPTV") Stations

One commenter, The Community Broadcasters Association, proposes that the Commission need make a determination that an LPTV station is qualified for carriage only if the LPTV station

asserts must-carry rights against a cable operator and is refused carriage. See Comments of The Community Broadcasters Association at 4. InterMedia strongly disagrees with this interpretation of the Act as it directly contravenes the plain language of the Act. Section 614(h)(2)(B) provides that "[t]he term 'qualified low power television station' means any television broadcast station . . . only if . . . (B) such station meets all obligations and requirements applicable to television broadcast stations . . . and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license." The Act clearly mandates that a determination be made by the Commission before an LPTV station can be considered to be qualified. Congress was also particularly clear and precise in requiring that LPTV stations meet very specific criteria in order to qualify for must-carry status. InterMedia submits that the Congressional mandate is clear that an LPTV station alone carries the burden of proving its qualifications. A cable operator is not required to carry an LPTV station unless and until the Commission has issued a final determination that the LPTV station is qualified.

F. Signal Quality

InterMedia agrees with the Commission and a majority of the commenters that the Commission's recently-adopted cable

television technical standard rules address any concerns regarding the quality of broadcast signals. The current technical standards ensure that no material degradation occurs on any video signal delivered to a subscriber, consistent with the requirements of the Act. It is unnecessary for the Commission to adopt additional requirements with regard to over-the-air signals. In addition, it would be inappropriate to require cable operators otherwise meeting the Commission's standards to enhance a signal received over-the-air. See Cable Television Technical and Operational Standards, 7 FCC Rcd. at 2024. The burden must lie with the broadcaster to deliver a good quality signal to the cable system's headend. In addition, the broadcast station must arrange and pay for any tests that may be required to determine whether the signal complies with the Act's signal strength requirements. See Comments of InterMedia Partners at 20.

G. Ghost-cancelling

At least one commenter suggested that the Commission has the authority to bar any stripping of ghost-cancelling reference signals. InterMedia strongly disagrees with this position. As noted in the NPRM, the Act provides that cable operators may delete signal enhancements, such as ghost-cancelling, from the signal of a commercial station and employ such enhancements at the system headend or headends. Clearly, the Commission does not have the authority to override Congress by barring cable operators from deleting signal enhancements when Congress expressly provided for such actions by cable operators.

The Commission also asked for comment as to whether cable operators may delete signal enhancements for noncommercial stations even though it is not specifically mentioned in the Act. InterMedia submits that cable operators should be permitted to delete signal enhancements for noncommercial stations as well. Deletion of signal enhancements is a technical issue and the requirements should apply equally to commercial and noncommercial stations. There is no evidence that Congress intended different results for noncommercial stations with respect to this issue.

H. Time Limits for Filing Complaints

At least two broadcasters proposed in their comments that no time limit should be imposed within which a broadcast station may file a complaint if it believes that a cable operator has failed to fulfill its must-carry obligations. This would impose an undue burden on both cable operators and subscribers. With regard to channel deletion and repositioning, the Act requires that cable operators provide thirty days prior notice. Clearly, the purpose of this provision is to provide a broadcast station with the opportunity to object before a change takes effect. Permitting broadcast stations to file complaints after a change goes into effect would result in needless disruption and uncertainty. InterMedia submits, along with many other commenters, that a thirty-day time limit should be imposed for the filing of a complaint challenging deletion or repositioning.

III. Retransmission Consent

A. Program Exhibition Rights

InterMedia submits that the retransmission consent provision of the Act will be completely ineffective unless the Commission firmly establishes that the broadcast station has the right to grant unfettered consent to the retransmission of its signal, including the right to exhibit all of the programming contained in its signal.[2] Congress' intent to "compensate the broadcaster for the value its product creates for the cable operator" forms the basis for the broadcast station's right under the Act to grant to or withhold consent from a cable operator to retransmit the station's signal. See S. Rep. No. 92, 102d Cong., 1st sess. 35 (1991). The intent of the retransmission consent provision of the Act is to address the "distortion in the video marketplace" under which "broadcasters in effect subsidize the establishment of their chief competitors". Id. Congress created a clear distinction between the program distributor's rights to the program and the broadcaster's rights to grant retransmission consent of its signal. The Senate Report notes that "under the cable compulsory copyright license, . . . the owners of programming on distant signals carried on cable systems receive compensation for their copyright interests through the Copyright Royalty Tribunal. The copyright scheme, however, does not purport to, and in fact does not, provide compensation to

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[2] InterMedia notes that Tribune Broadcasting Company, which is both a broadcaster and a programmer, agrees with this position. See Comments of Tribune Broadcasting Company at 4-7.

broadcasters for their rights in the signals." Id. Clearly, in enacting the retransmission consent provision of the Act, Congress intended to compensate broadcasters for the value of their signals and not to provide additional compensation to copyright holders.

Accordingly, InterMedia proposes that, consistent with Congressional intent, the Commission must prohibit program distributors from entering into or enforcing contracts which supersede any retransmission consent rights, including affiliation contracts between networks and local stations. In enacting the retransmission consent provision of the Act, Congress intended to provide rights to local broadcast stations which would alleviate the imbalance in the local marketplace. Congress did not intend to enrich the networks further by enabling them to receive a portion of the proceeds intended for local broadcasters.

B. Multichannel Video Program Distributors

The overwhelming consensus of commenters that addressed the issue of whether the retransmission consent provisions of the Act apply to direct broadcast satellite service ("DBS"), multipoint, multichannel distribution service ("MMDS"), master antenna television service "(MATV"), and satellite master antenna service ("SMATV") operators is that Congress intended these operators to obtain the consent of any broadcast station whose signal the operator wishes to retransmit. InterMedia agrees. In particular, InterMedia notes that no commenter disputed this

interpretation of the definition of "multichannel video program distributor." Accordingly, InterMedia submits that the plain language of the Act dictates that multichannel video programming distributors include DBS, MMDS, MATV, and SMATV operators and that these entities must obtain retransmission consent prior to retransmitting the signal of any broadcast station.

C. Procedural Requirements

InterMedia has proposed, in its previously submitted comments, that the election of must-carry and retransmission consent occur simultaneously. Most commenters agreed. This concurrent election is necessary in order for the cable operator to effectively accommodate those stations electing must-carry status as well as those stations with which it has retransmission consent contracts. This will avoid the piecemeal process of adding and deleting stations which would result from different election dates. Moreover, InterMedia submits that the Commission afford cable operators at least 90 days to implement a station's election. Ideally, the implementation date should coincide with the beginning of a copyright reporting period.

In addition, InterMedia has addressed the implications of a station's failure to make a proper election, whether because a station fails to follow the Commission's notification procedures or because the station fails to take any action. InterMedia submits that a cable operator should be prohibited from carrying a station that has failed to make an election unless that station is already being carried by the cable

operator. If a station which is being carried by a cable operator fails to make an election, the operator should have the option of continuing to carry the station, absent any of the rights associated with mandatory carriage.[3] Any station which fails to make an election during the election "window" should be precluded from asserting either must-carry or retransmission consent rights until the next "window" opens.

D. Retransmission Consent Contracts

Most commenters agreed with InterMedia in asserting that broadcast stations that elect retransmission consent are not automatically entitled to rights with regard to channel positioning, carriage of full program schedule, "syndex" and network nonduplication protection. Instead, these stations must negotiate to include such rights in their retransmission consent contracts. Although the Act does not preclude a retransmission consent station from negotiating for those rights which are mandatory for must-carry stations, the Act is clear that a negotiated retransmission consent contract cannot conflict with any of the rights of a must-carry station on the system.

InterMedia also agrees with most commenters that a retransmission consent agreement should not permit the exclusive carriage of a broadcast signal which precludes another cable system or multichannel video programming provider in the franchise area from obtaining access to that station's

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[3] InterMedia has submitted that, in order to avoid confusion, this type of signal should be called a "may-carry" signal. See Comments of InterMedia Partners at 32.

programming. Such an exclusivity provision would not be in the public interest.[4]

Finally, InterMedia notes that the Act requires the Commission to consider the impact of retransmission consent on rates for basic service to ensure that such rates are reasonable. InterMedia agrees with the many commenters which noted that retransmission consent fees are a direct cost of providing basic service, and thus cable operators must be allowed to pass through the costs of retransmission consent fees directly to subscribers without having to obtain approval. The Commission has an affirmative obligation to ensure that retransmission consent terms demanded by broadcasters are not unreasonable.

E. Applicability to Radio Stations

InterMedia submits that radio stations are not subject to the retransmission consent provisions of the Act. It was not the intent of Congress to apply the retransmission consent provisions to audio signals. Both the language and the legislative history of the Act evidence the fact that Congress intended to limit application of the retransmission consent provisions to television signals. InterMedia agrees with the many commenters which asserted that radio stations are not subject to retransmission consent. See Comments of Adelphia

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[4] United Video, Inc. has proposed that the Commission authorize satellite carriers and terrestrial microwave carriers to act as agents on behalf of cable operators in obtaining retransmission consent from broadcast stations. See Comments of United Video, Inc. at 10-11. InterMedia supports this proposal as a possible option to considered. Of course, such an agency agreement should not be made mandatory.

Communications Corporation, et al. at 38-32; see also Comments of United Video, Inc. at 11.

IV. Conclusion

InterMedia respectfully submits the foregoing comments and urges the Commission to adopt regulations with regard to must-carry and retransmission consent which will result in minimal disruption to subscribers, cable operators and broadcasters. In particular, InterMedia respectfully urges that the Commission be sensitive to the amount of time which will be necessary to implement these changes in order to avoid unnecessary disruption to cable subscribers.

RESPECTFULLY SUBMITTED,

INTERMEDIA PARTNERS

By: _____

Stephen R. Ross
Paula E. Brodeur

ROSS & HARDIES
888 16th Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 296-8600

Dated: 1/19/93